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No. 81-2257

In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE BOARD'S DETERMINATION OF A CIVIL ACTION'S "REASONABLENESS" USURPS THE FUNCTION OF THE STATE COURTS.

The brief filed by the National Labor Relations Board ("NLRB," or "the Board") seems, at many points, to be structured as if the issue in this case were whether an employer is entitled to maintain a civil lawsuit against his employees when that suit, though ostensibly seeking lawful objectives, is in fact insubstantial and retaliatory. That, we submit, is *not* the issue in this case. Instead, the real issue is which *forum* — the Board or the court in which the suit was filed — shall have jurisdiction to determine the factual and

legal sufficiency of the suit and the proper remedy for an infringement of rights caused by the suit. As to that issue, petitioner submits that precedent and reason consign such a determination to the civil court.

The Board argues, at great length, that it must have the power to evaluate the factual basis and the underlying motivation for an employer's civil litigation, and to order withdrawal of groundless, retaliatory suits, because, in the absence of such power, employees will be burdened with the cost and effort of defense. [NLRB Brief, pp. 24-29.][1] The Board further contends that "it is especially important" that it be able to proscribe such suits "in order to preserve an atmosphere in which employees are not discouraged from, and punished for, the exercise of protected activity." [*Id.* at 25.] These arguments, we submit, run counter to this Court's landmark decisions in *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), and in *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977), which held that the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* (1976), does not preempt state court jurisdiction over suits for tortious conduct occurring during a labor dispute.

The Board contends that *Linn* and *Farmer* do not assist the Restaurant because neither case involved "a suit that was alleged to have been filed for the purpose of retaliation for protected conduct." [NLRB Brief, p. 39.] While acknowledging that, under *Linn* and *Farmer*, state tort claims "normally will be filed and adjudicated in state court" [*id.* at 40], the Board asserts that those holdings do not prevent the NLRB from making a threshold determination regarding motivation and from screening out retaliatory suits *before* judicial review. [*Id.* at 40-41.] Petitioner believes that the Board's adoption of this screening function, insofar as it requires the civil plaintiff to demonstrate the merits of his suit to the Board, essentially

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[1] The Board's answering brief shall be cited as "NLRB Brief." The parties' consecutively-paginated Joint Appendix shall be cited as "Jt. App." The Appendix to the Petition for a Writ of Certiorari, containing the decisions of the Administrative Law Judge ("ALJ"), the NLRB, and the Court of Appeals, shall be cited as "Pet. App." The documents included in the Appendix to Petitioner's Brief shall be cited as "Br. App." References to the transcript of hearing before the ALJ, where not found in the Joint Appendix, shall appear as "Tr."

nullifies *Linn* and *Farmer* and contravenes the principles of federalism upon which those decisions were based.

In the *Linn* case, this Court fully recognized the possibility that employers might bring libel suits for coercive or retaliatory purposes. Employers could, the Court observed, use such suits to "truncate the free discussion envisioned by the Act." 383 U.S. at 64. Or they might use such suits "as weapons of economic coercion." *Id.* However, in light of the "deeply rooted" state interest in resolving libel claims [*id.* at *62*], the inability of the NLRB to provide relief to employers faced with tortious conduct, and the importance of preserving access to the judiciary, this Court concluded that libel claims arising out of labor disputes were not preempted by the NLRA. In order to guard against the "abuse of libel actions" [*id.* at 65], the Court did prescribe a screening function, but it was a function to be performed by the state court, not by the NLRB. Thus, the Court ruled that an employer's libel suit could not succeed unless it proved (1) that the defamatory statement had been circulated with malice,[2] and (2) that actual harm had resulted from the defamation. In addition, the Court cautioned trial judges to be vigilant against excessive damage awards. [*Id.* at 64-66.] An equivalent accommodation was reached in the *Farmer* case, which dealt with a civil action for intentional infliction of emotional distress. *See* 430 U.S. at 305-06.

It is apparent, both from the Board's current arguments and from its actual procedures in this case, that any NLRB effort to

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[2] In *Linn*, the Court applied a malice standard requiring knowledge of falsehood or reckless disregard of truth or falsity (383 U.S. at 65), because it recognized that labor disputes are "frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Id.* at 58. Indeed, eight years after *Linn*, in *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), the Court ruled that the word "scab" was not defamatory under the NLRA. In the present case, however, the alleged defamation was not the sort of abusive or insulting language commonly heard during labor disputes. The accusations by past and present employees that the Restaurant's restrooms were "filthy" and its waitresses sexually harassed were calculated to jeopardize the Restaurant's business and its image in the community, rather than merely to criticize its management. Challenging such accusations in court could hardly be viewed as unreasonable. *See NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953).

determine whether a civil tort suit is retaliatory will necessitate a preliminary trial of the merits of the tort claim. Otherwise, the Board could not determine whether the claim is "colorable" or has a "reasonable basis in fact."[3] [See NLRB Brief, pp. 40-41.] And that determination, in a case such as the one at bar, requires an application of *state* law to the facts, a function which the *state court* would perform if the tort claim were processed without NLRB interruption. Thus, the Board is actually espousing a threshold substitution of its own judgment on state law for that of the state court.

There are several reasons to repudiate the Board's proposed procedure. In the first place, the Board is not as well qualified as the state court to determine the factual sufficiency of a civil tort claim, and a program of threshold factual inquiry by the Board poses a greater likelihood of faulty decisions. Second, even if the Board's lack of expertise were not a problem, its procedures would be. Under the Board's usual rules, the "reasonable basis" determination would have to be made in the absence of employer discovery. Thus, in the case of a libel claim, the Board's procedures would deny the employer a meaningful opportunity to investigate state-of-mind facts relevant to the critical issue of malice, enhancing the possibility of an NLRB order that the suit be withdrawn. The threshold analysis by the Board would thus be the only adjudication ever made of the suit's merits. Accordingly, the Restaurant's concerns about being deprived of a jury trial are not, as the Board contends, "irrelevant." [NLRB Brief, p. 41, n.26.] Even if an employer's suit managed to survive Board scrutiny, considerable cost and delay would have been incurred, and the employer's success before the Board would mean

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[3] Although the Board's ALJ did state that two "threats" by Restaurant managers were also "significant factors" in determining the motive for the civil suit, the entire tenor of his discussion makes it evident that his finding of "no reasonable basis" to the suit was the primary factor in his finding that the motive for suit had to be unlawful. [See Pet. App. A-40 to A-42; see also NLRB Brief, p. 36.] The NLRB's willingness to infer an unlawful motive for civil litigation when a suit lacks a "reasonable factual basis" is further demonstrated by its decision in *Power Systems, Inc.*, 239 N.L.R.B. 445 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979). In that case, the Board stated: "*Since* we have found that the Respondent had no reasonable basis for the filing of its lawsuit, *we conclude* that the lawsuit had as its purpose the unlawful objective of penalizing Sanford for filing a charge with the Board. . . ." *Id.* at 450 (emphasis added).

only that he had won the right to proceed with his interrupted state lawsuit. Furthermore, to the extent that NLRB intervention impedes the employer from obtaining preliminary injunctive relief against tortious conduct, it could promote the kinds of confrontation and violence that this Court sought to discourage in *Linn*. *See* 383 U.S. at 64 n.6. Accordingly, there is little to recommend the screening function now sought by the Board.

The Board does not, of course, concede that its preliminary screening of employer litigation will require it to perform factual or legal analyses reserved to the state court. In the present case, the Board insists that it "did not attempt to adjudicate the merits of the state court suit . . ." [NLRB Brief, pp. 16, 36.] Indeed, argues the Board, no such adjudication was necessary, because in this case there was "a complete absence of evidence that petitioner had any reasonable basis for its suit." [*Id.* at 37.] In other sections of its Brief, the Board persistently cites the "complete lack of evidentiary foundation" for the Restaurant's suit [*id.* at 38], and suggests that the state court claims were "not even colorable." [*Id.* at 40.]

The record, however, does not support the Board's contentions on this subject. The Administrative Law Judge ("ALJ") admitted substantial evidence on the issues raised by the Restaurant's suit, and he purported to evaluate that evidence in reaching his conclusion that the suit had "no reasonable basis in fact."[4] He engaged in a "close examination" of the statements on the allegedly libelous leaflet and concluded that the "evidence establishes the truthfulness

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[4] The ALJ had before him, among other things, the objectionable leaflet itself [Jt. App. 2], the verified state court complaint [*id.* at 3-9], the direct testimony of one of the owners of the Restaurant that the accusation of a "filthy restroom" was "a lie" [*id.* at 109], testimony from the demonstrators themselves indicating that they made such an accusation with little regard for the truth [*e.g.*, *id.* at 128-29, 138-39], testimony indicating that the claim of "unwarranted sexual advances" was a reckless exaggeration of minor and long-forgotten incidents [*e.g.*, *id.* at 130-31, 133-34, 137-38, 140-43, 152-54], and testimony from both demonstrators and managers that traffic on the Restaurant's driveways had been temporarily blocked or slowed [*id.* at 76-77, 83, 96-101, 106-07], that at least one customer had been insulted [*id.* at 78], and that other protesters were expected to join the original group [*id.* at 71]. Accordingly, the NLRB's claim that the ALJ was faced with "a complete lack of evidentiary foundation" for the Restaurant's suit [NLRB Brief, p. 38] is an unfair characterization of the record.

of all six 'waitresses' complaints' listed in the leaflet." [Pet. App. A-40 to A-41.] With respect to the Restaurant's claim that other defamatory statements had been uttered, the ALJ ruled that "the record contains no evidence capable of such a construction." [*Id.* at A-41.] Regarding the Restaurant's claim that the protesters improperly interfered with its business and customers, the ALJ held that "the evidence fails to support any of these contentions." [*Id.*] Thus, the ALJ performed the very same function that the Restaurant had asked the state court to perform when it filed its complaint, that is, to determine whether, on the evidence, the demonstrators' oral and written statements were defamatory and whether the picketers' conduct had exceeded permissible boundaries.[5] In effect, the NLRB *tried* the Restaurant's civil suit in order to make a *threshold* determination that it lacked a reasonable basis.

Even if the Court were to accept the Board's argument that it is entitled to make some kind of threshold determination of reasonableness, that is clearly *not* what the Board did in this case. A true "threshold" analysis would have been completed after finding that the civil lawsuit had "a lawful objective on its face" [Pet. App. at A-10], and that the outcome of the action would depend upon factual determinations and the application of state law to the facts. At that point, the Board should have deferred to the state court because the Restaurant's suit raised issues "deeply rooted in local feeling and responsibility." *Linn*, 383 U.S. at 62. The Board argues that "there is little reason for deference to state courts" in the case of insubstantial and retaliatory suits. [NLRB Brief, p. 14.] But this

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[5] In its answering brief, the Board states that the questions presented for review by this Court do not include a challenge to the Board's finding that the Restaurant's civil suit lacked a "reasonable factual basis" and was filed for retaliatory purposes. [NLRB Brief, pp. 13, 37 n.25.] The Restaurant does disagree with the Board's finding, but the Restaurant's primary position is that the NLRB is *without jurisdiction* to analyze the factual basis and the underlying motivation for a civil tort action that, on its face, seeks a lawful objective and that is not part of a larger pattern of unlawful conduct. Moreover, in analyzing the validity of the Board's "reasonable basis" test, this Court should not ignore the manner in which that test was applied in the instant case, resulting in the Board's ruling that a restaurant was barred from judicially challenging public statements that its employee restrooms were "filthy . . . with no soap, paper towels or toilet tissue provided." [Jt. App. 2.] Such a ruling demonstrates that the Board, under the guise of applying a "reasonable basis" test, is actually placing a far greater burden upon the civil plaintiff.

argument *assumes* the issue in dispute; that is, which forum shall determine whether a suit is insubstantial or retaliatory? Under *Linn*, and basic principles of federalism and comity, the deference that the NLRB must accord to the state judiciary with respect to matters of local concern, such as claims of tortious conduct, is not a function of the substantive merit or the motive underlying the litigation. After all, the state court's interest in protecting its citizens from insubstantial or retaliatory suits is just as great as its interest in the success of meritorious claims.

The Board's insistence that "the machinery of the state court system" cannot adequately protect the federally-created rights of employees, nor provide remedies for infringement of these rights [NLRB Brief, p. 26], sounds a theme that has been frequently rejected by this Court. *See, e.g., Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978); *NLRB v. Boeing Co.*, 412 U.S. 67, 76-77 (1973); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962). *See also Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975). The Board's reliance upon *Clayton v. International Union*, 451 U.S. 679 (1981) [NLRB Brief, p. 26], is misplaced, because there the Court refused to require exhaustion of procedures that were demonstrably futile. In the present case, there is no reason to doubt the ability of the judicial machinery of the State of Arizona to fully and effectively protect the demonstrators from an insubstantial or retaliatory lawsuit and, therefore, from any infringement upon their federal rights. In this context, it is significant that the Board has not criticized the scope of the temporary restraining order signed by the trial court, the rulings rendered on the parties' cross-motions for summary judgment, nor any of the other orders issued by that court.

The Board argues that the defendants' cost of defending the state litigation may be substantial, and that, even if the defendants are successful in state court, "they probably would not receive attorneys' fees." [NLRB Brief, p. 26 n.19.] However, the Board does acknowledge the existence of an Arizona statute providing attorneys' fees to the prevailing party "upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless [and] not made in good faith." [*Id.*] Apparently the Board believes that the state court will "probably" not agree with the Board's findings regarding the nature of the Restaurant's suit. Perhaps the Board is correct in that perception. If so, it simply highlights

the deficiencies in the Board's position. Once again, it becomes clear that the real issue is which forum should determine the reasonableness of the suit, the propriety of the motives for bringing the suit, and the remedy for a groundless suit. We submit that such matters are properly resolved only by state trial courts, which are more accustomed to evaluating them in "varying factual contexts than . . . is . . . a specialized agency." *NLRB v. Boeing Co.*, 412 U.S. 67, 76-77 (1973).

II. THIS CASE PRESENTS NO BASIS FOR INTERFERENCE WITH THE RESTAURANT'S CONSTITUTIONAL RIGHT TO PETITION THE JUDICIARY.

In the case at bar, the Restaurant does not challenge the Board's jurisdiction to find an unfair labor practice, and to issue an appropriate cease-and-desist order, when the complaint in a civil action seeks an unlawful objective on its face, or is preempted by the NLRA. *See, e.g., NLRB v. Granite State Joint Board,* 409 U.S. 213 (1972); *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *United Credit Bureau of America, Inc. v. NLRB,* 643 F.2d 1017 (4th Cir.), *cert. denied,* 454 U.S. 994 (1981). Unlike that line of cases, however, in which a superior federal interest is present, the instant case involves a lawsuit that is not preempted by the NLRA [Pet. App. A-12, A-48], and that does have "a lawful objective on its face." [Pet. App. A-10.] Nevertheless, the Board now claims the right even in such cases to make a threshold inquiry regarding the plaintiff's good faith, including an analysis of whether there is a reasonable basis in fact for the allegations in the civil complaint, and to order the litigation withdrawn if the suit fails to survive such scrutiny. Granting the Board such authority, we are told, would be entirely consistent with those extremely rare cases in which this Court has recognized exceptions to the well-established doctrine prohibiting federal interference with state court litigation. *See Younger v. Harris,* 401 U.S. 37 (1971). [NLRB Brief, pp. 30-35.] Petitioner submits that the present case is not at all similar to those exceptional cases, and that the state's interest in controlling tort litigation arising out of a labor dispute is far superior to the Board's interest in evaluating the substance and motive for such litigation.

A. The Exception For "Harassing And Sham State Court Proceedings Of A Repetitive Nature" Does Not Apply Here.

The Board argues that the legal principles that it applied in ordering cessation of the Restaurant's civil litigation are similar to principles established by this Court in antitrust cases such as *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). But the analogy does not succeed. In *Noerr*, the Court held that Section 1 of the Sherman Act, 15 U.S.C. § 1 (1973), does not bar joint efforts to obtain anticompetitive legislation. The Court did suggest, however, that a violation of the Act might be found when such efforts are "a mere sham" to camouflage direct interference with a competitor's business relationships. 365 U.S. at 144. In *California Motor Transport*, the Court held that an egregious pattern of anticompetitive activities, including litigation, warranted a limited departure from the general rule that the First Amendment right to petition the judiciary is not rendered invalid by the plaintiff's desire to obtain a business advantage. The unique circumstances that led to the Court's decision included allegations that the members of a trade group had conspired "to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, [and] to defeat that right by massive, concerted, and purposeful activities." 404 U.S. at 515. The following year, the Court stated that *California Motor Transport* was applicable where there are "repetitive lawsuits carrying the hallmark of insubstantial claims." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973). Four years thereafter, a majority of the Justices construed *California Motor Transport* as holding that "harassing and sham state court proceedings of a repetitive nature," or a "pattern of baseless, repetitive claims," could constitute an antitrust violation. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 n.6, 644 (1977). Significantly, the question of whether such circumstances would justify a federal court injunction against pending state court proceedings, which was not addressed in *California Motor Transport*, produced substantial disagreement in *Vendo*.

Exceptions to general constitutional doctrines must be very narrowly construed. The case presently before the Court does not involve a denial of "free and unlimited access" to any agency or court, does not involve "massive activities," and does not involve

a "pattern of baseless, repetitive claims." Rather, this case involves a single, garden-variety civil action for obstruction, trespass, and libel occurring during a labor dispute. Absent from this case is any evidence that the Restaurant utilized its civil litigation in some extraordinary fashion to harass the defendants, to cause them unreasonable expense, or to impose unusual burdens upon them.[6]

It is also significant that the Restaurant obtained judicial rulings supporting its legal position — the Restaurant's application for a temporary restraining order was granted, after a hearing; defendants' counterclaim for abuse of process was dismissed; and defendants' motion for summary judgment on the Restaurant's libel claim was denied. [Jt. App. 19-22, 94-95; Br. App. "D".] *Compare Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1079 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) ("particularly hard" to characterize successful action as "baseless" or "frivolous"), *with Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1267 (9th Cir. 1982) (tariff bureau's denial of all of defendants' claims demonstrates "baselessness" of claims). We submit that the right of a single employer to file a single lawsuit alleging that a group of protesters has committed or has threatened tortious acts is not the kind of resort to the judicial process which, even in the presence of retaliatory motivation, was intended to be

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[6] The Board cites *International Organization of Masters*, 224 N.L.R.B. 1626 (1976), *enforced*, 575 F.2d 896 (D.C. Cir. 1978), as an example of a lawsuit found in violation of the NLRA because it was not filed "in complete good faith." [NLRB Brief, pp. 20-21.] The *Masters* case is distinguishable from the present case in significant respects. First of all, the union in *Masters* utilized an *in rem* action to obtain a lien against the employer's vessel, requiring the owner to post a $100,000 bond for the vessel's release. Secondly, there was ample evidence that the civil action was directly related to picketing, handbilling, and other activities, all of which had the unlawful objective of compelling the employer to replace its existing employees with those belonging to the union. 575 F.2d at 904. Finally, it is significant that in *Masters* the Board did not attempt to interfere with any pending state court proceeding, and its order contained no mandate with respect to such a proceeding. The facts in *Masters* are thus much closer to the facts in *California Motor Transport* than are the facts in the present case.

encompassed by the principle of *California Motor Transport*.[7] The Restaurant's civil litigation simply did not rise to the level of obnoxiousness that would warrant federal interference with its First Amendment right to petition the judiciary.

B. The Exception For "State Proceedings Motivated By A Desire To Harass" Does Not Apply Here.

The NLRB seeks to analogize this case to *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Younger v. Harris*, 401 U.S. 37 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Those cases recognized the propriety of "federal interference in state court proceedings" brought by state officials in bad faith or to discourage protected activities. [NLRB Brief, p. 33.] But the Board's analogy actually serves to strengthen the arguments supporting federal abstention from interference in the Restaurant's civil litigation.

All three of the cases cited by the Board involved state use of criminal or quasi-criminal proceedings to enforce allegedly unconstitutional statutes. Only in *Dombrowski*, where there was purportedly "a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants" (380 U.S. at 482), did this Court approve a federal court injunction against the state proceedings. In *Younger* and *Huffman*, on the other hand, no such pattern existed, and the Court held that federal intervention was unwarranted because "the threat to the plaintiff's federally protected rights [could] be eliminated by his defense against a single criminal prosecution." 401 U.S. at 46; 420 U.S. at 604. That reasoning is clearly applicable, by analogy, to the present case, since the protesters' successful defense of the Restaurant's single civil action would have eliminated any alleged "threat" to their "federally protected rights." The dispositive question in such cases is whether the state

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[7] The Board has been inconsistent and selective in its approach to the principle of *California Motor Transport*. In *Power Systems, Inc.*, 239 N.L.R.B. 445 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979), the Board ruled that an employer had committed an unfair labor practice by suing an employee who had filed a series of baseless administrative charges. Having held in *Power Systems* that the employee's *numerous* groundless charges were privileged, the Board now urges this Court to rule that a *single* groundless action by an employer would not be privileged.

judiciary is able to provide a fair and effective forum for the dispute, including the resolution of constitutional and other federal issues, and this Court has repeatedly required deferral to a pending state proceeding with respect to such issues. *E.g.*, *Moore v. Sims*, 442 U.S. 415, 430, 435 (1979); *Huffman*, 420 U.S. at 608-10. In the present case, there is no challenge to the ability or willingness of the state judiciary to properly balance employee rights under the NLRA against the property rights of an employer.

We recognize that, in *Huffman* and *Younger*, the Court did acknowledge an exception to the abstention doctrine where "the state proceeding is motivated by a desire to harass or is conducted in bad faith." 420 U.S. at 611; 401 U.S. at 49, 54. However, the Court's statements regarding that exception should be understood in the context of the underlying cases — state actions to enforce allegedly unconstitutional statutes — and applied only to proceedings in which litigation is pursued in such an oppressive or repetitive manner that the successful defense of one case is unlikely to secure the rights at issue.[8] The Court has repeatedly disapproved federal intervention in the absence of such extraordinary circumstances.

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[8] In cases involving enforcement of state criminal statutes, the Court has interpreted "bad faith" to mean prosecution "without hope of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975); *Dombrowski*, 380 U.S. at 490. The Board did not find that the Restaurant instituted its suit without hope of success, *i.e.*, the securing of an injunction against tortious conduct and compensation for damages suffered. Indeed, the Restaurant was successful in several aspects of the litigation. See p. 10, *supra*. Furthermore, the Restaurant's plea for $500,000 damages does not constitute the kind of "harassment" that would justify federal intervention under the *Dombrowski* precedent, as suggested by the Board. [NLRB Brief, p. 35.] *See Cousins v. Wigoda*, 463 F.2d 603, 608 (7th Cir. 1972) (a "frivolous and overly broad" prayer for relief "is not the kind of conduct which the Supreme Court described as 'bad faith' or 'harassment' in *Dombrowski*"). In fact, the Board shows little concern for consistency when it argues, on the one hand, that the Restaurant's $500,000 plea evidenced its utilization of litigation for harassment [NLRB Brief, p. 35], while also arguing, on the other hand, that there was no evidence of improper motive in the slander suit considered in *S. E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), despite the plea for $50,000 damages against an employee earning only minimum wage. [NLRB Brief, p. 29.] *See also Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (employer's defamation suit sought $1,000,000 in damages from union, two union officials, and a company employee).

See, e.g., Moore, 442 U.S. 415; *Juidice v. Vail*, 430 U.S. 327 (1977). No such circumstances exist in the present case.

The Ninth Circuit and the Board's ALJ determined that the Restaurant's civil action had to be enjoined because of "the chilling effect of a state lawsuit upon activity protected by the Act." [Pet. App. A-12 n.3, A-42.] But in *Younger* this Court held that "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." 401 U.S. at 51. The rulings of the Ninth Circuit and the Board in this case are therefore inconsistent with the principles established by this Court in *Dombrowski, Huffman* and *Younger*, because those rulings ignore the Court's admonition that federal interference with state judicial proceedings will be tolerated only in the most extreme and unusual circumstances.

C. The Exception For Conduct That Constitutes An Abuse Of Process Does Not Apply Here.

The Board contends on page 34 of its brief that an employer's retaliatory suit against his employees is analogous to an abuse of process, justifying the Board's cease-and-desist order. That, argues the Board, is what happened in the present case. The great irony in this case is, of course, that the state court ruled that no abuse of process had occurred. [Br. App. "D".] Thus, the issue becomes: shall the state court or the NLRB be the final arbiter of whether state judicial processes have been abused? We submit that the answer is self-evident.[9]

Moreover, even if the Board could order an employer to cease a state court proceeding on the ground that his abuse of process is threatening rights protected by the NLRA, such a drastic measure cannot, as the Board asserts [Brief, p. 34, n. 22], be founded merely upon the *institution* of a suit. *See Blue Goose Growers, Inc. v. Yuma Groves, Inc.*, 641 F.2d 695, 697 (9th Cir. 1981). Nor could it be founded solely upon the Board's finding that the suit is tainted by

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[9] In the case relied upon by the Board, *Alexander v. Unification Church of America*, 634 F.2d 673 (2d Cir. 1980), the appellate court, not an outside agency, made the determination that a cause of action for abuse of process had been alleged in the complaint, and the matter was remanded to the trial court for factual findings.

retaliatory motivation. Such a finding does not, without more, establish an abuse of process. Thus, in refusing to find an employer's suit against a union to be an unfair labor practice, the Second Circuit held:

> But even if we assume that the Company was improperly motivated — that it intended the suit to induce the Union to withdraw its charges — this alone would not make resort to the courts unlawful so as to justify an unfair labor practice finding. Abuse of process requires more than simply improper motive. There must also be some action taken to utilize the court's processes for collateral purposes not related to the suit in question, for example, improper use of a subpoena.

Lodge 743, IAMAW v. United Aircraft Corp., 534 F.2d 422, 464-65 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). *See also* W. Prosser, *Handbook of the Law of Torts* § 121, at p. 857 (4th ed. 1971) ("[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.").

The Board does contend that the Restaurant's "improper use of the information gained in the depositions of its employees" constituted an abuse of process. [NLRB Brief, p. 34, n.22.] For example, the Board argues that the Restaurant sought to establish a defense to the pending unfair labor practice hearing on Ruth Helton's discharge by asking "numerous questions" relevant to the issues in that proceeding. [*Id.* at 6-7, 36.] Such discovery does not constitute an abuse of process, however, because it was directed at, and relevant to, issues underlying the Restaurant's civil suit.[10] *See Blue Goose Growers*, 641 F.2d at 697. After all, the Board itself has previously held that an employer does not violate the NLRA by filing a slander suit against an employee who publicly asserts that she has been threatened with discharge as a result of her union activities. *S. E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977).

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[10] The NLRB also claims that the Restaurant used the information obtained in its depositions "for interrogating a former waitress" [NLRB Brief, p. 36], but one manager's nonthreatening inquiries to a former employee he had known for many years [Tr. 455] cannot fairly be considered an "abuse of process" even if, under the NLRA, they technically constitute an "interrogation."

In the present case, Ruth Helton's leaflet, upon which the Restaurant's libel action was based, alleged that she had been discharged because of her union activities. [Jt. App. 2.] If the filing of the suit was lawful, the taking of discovery relevant to Helton's alleged defamation could hardly be characterized as an abuse of process. Furthermore, the Restaurant was acting under authority of a court order permitting discovery into the factual basis for each allegation on the offensive leaflet. [Jt. App. 39-40.] In comparable circumstances, this Court has held that a party's reliance on "judicial authorization" for his conduct operates to dispel an inference of bad faith. *Hicks v. Miranda*, 422 U.S. 332, 351 (1975).

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978), does not compel a different result. In that case, the Court upheld the Board's refusal to permit prehearing disclosure of witness statements given to Board investigators. In the present case, the employer's inquiry was directed at statements made *publicly* on the streets of Phoenix. If an employee could preclude employer litigation and discovery based on his public accusations merely by also filing his accusations with the appropriate federal agency, employers would be extremely vulnerable to defamation. In the present case, for example, could the employees have avoided a libel suit based on their accusation of "filthy restrooms" by filing a complaint with the Occupational Safety and Health Administration? Could the employees have likewise avoided a suit based on their public accusations of "unwarranted sexual advances" by filing charges with the Equal Employment Opportunity Commission? Any privilege that attaches to such statements, we submit, is limited by the nature and location of the publication: if the statements are made to the appropriate state or federal agency, a privilege attaches and a subsequent defamation suit may not be maintained; on the other hand, if the same statements are made publicly, then the publisher may be held responsible for his actions in a court proceeding. [See cases cited in petitioner's opening brief, pp. 27-28.]

III. THE BOARD'S REQUEST FOR A GENERAL EXEMPTION FROM THE ANTI-INJUNCTION ACT IS NOT SUPPORTED BY THE ACT OR BY LEGAL PRECEDENT.

Petitioner's opening brief [pp. 36-40] argued that the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), prohibited the Board from enjoining state judicial proceedings except where one of the three statutory exceptions was applicable or, under *NLRB v. Nash-Finch*

Co., 404 U.S. 138 (1971), where state action was preempted by the NLRA. In response, the Board contends that the principle of *Nash-Finch* is not limited to situations in which state action is preempted, but instead "encompasses any situation in which a state court suit threatens to abridge 'federal rights' the United States or one of its agencies is entrusted with protecting." [NLRB Brief, p. 44.] Petitioner urges this Court to reject such an expansive interpretation of the statute and to hold, again, that the prohibition of Section 2283 "is not to be whittled away by judicial improvisation." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 631 (1977). *See also Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970); *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511 (1955).

In seeking a total exemption from the mandate of Section 2283, the Board relies upon cases in which this Court has subordinated the prohibition of the statute to "superior federal interests." [NLRB Brief, p. 43.] But the cases relied upon are inapposite, since, unlike the present situation, the interest of the state court in hearing those cases was clearly not as great as the interest of the federal forum. In *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), for example, the United States obtained an injunction against state litigation over land in which it had an interest, since it was not a party to such litigation, and since its own action to quiet title to the land was then pending in federal district court. In *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), the Board enjoined a state court injunction directed at picketing, handbilling and other protected conduct subject to the preemptive jurisdiction of the Board.[11]

In clear contrast to the circumstances of *Leiter Minerals* and *Nash-Finch*, the Restaurant's state court suit did not involve issues that were pending before or subject to the preemptive jurisdiction of a federal court or agency. Moreover, as *Linn, Farmer* and their progeny make abundantly clear, there is "an overriding state interest" in resolving claims of tortious conduct arising out of labor

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[11] *See also Bowles v. Willingham*, 321 U.S. 503 (1944), in which the Administrator of the Office of Price Administration was held entitled to enjoin state proceedings challenging certain OPA regulations, despite the Anti-Injunction Act, because an Emergency Court of Appeals had preemptive jurisdiction over such challenges. *Id.* at 510-11.

disputes that is in fact superior to the "merely peripheral concern" that the Board might have in ruling upon the application of the NLRA to the same conduct. *Linn*, 383 U.S. at 61; *Farmer*, 430 U.S. at 298, 303-04. The Board's response is that its interest lies in preventing retaliation, not in adjudicating the merits of the state suit [NLRB Brief, pp. 35-41], but the Board proposes to analyze the factual and legal basis of the suit in order to draw an inference regarding motive. The Board's interest in preventing abuse of federal rights is, we submit, insufficient to justify the massive intrusion into the state judicial process caused by its preliminary screening of employer tort suits.

In support of its claim that Section 2283 is inapplicable, the NLRB cites two cases in which this Court, without considering the Section, upheld Board orders requiring unions to terminate state court litigation to recover fines charged to former members. *Booster Lodge 405, IAMAW v. NLRB*, 412 U.S. 84 (1973); *NLRB v. Granite State Joint Board*, 409 U.S. 213 (1972). [NLRB Brief, pp. 43-44.] In both cases cited, however, the very relief sought — the collection of fines for post-resignation conduct — would have violated the NLRA. The federal interest to be protected could thus be discerned on the face of the state court pleadings, without requiring a preliminary trial of the merits or a construction of state law. In the present case, on the other hand, the Restaurant's civil suit "had a lawful objective on its face" [Pet. App. A-10], and the Board's conclusion that the suit infringed upon federal rights was based upon an analysis of the factual and legal basis for the tort action.[12]

The Board also argues that, even if Section 2283 does apply, the order in this case was proper under the exception for injunctions "necessary in aid of [the Board's] jurisdiction." [NLRB Brief, p. 46.] In a classic example of "bootstrap" reasoning, the Board

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[12] Although the Board's injunction against a *pending* civil suit may be barred by Section 2283, the Board may have the power to enjoin the commencement of a *subsequent* suit if it concludes from the course and outcome of the first one that such additional proceedings would violate the NLRA. *See Vendo*, 433 U.S. at 635 n.6. The Board may also, in appropriate circumstances, rule that a *completed* civil action was an unfair labor practice. *See International Organization of Masters*, 224 N.L.R.B. 1626 (1976), *enforced*, 575 F.2d 896 (D.C. Cir. 1978) (union's *in rem* action against employer's vessel, coupled with picketing and other coercive activities, violated NLRA).

declares that, in order to decide whether the filing of the state court lawsuit was an unfair labor practice, it had jurisdiction to determine whether the suit had a "reasonable factual basis," and it had the authority to issue an injunction in aid of this "jurisdiction." The flaw in this theory is, of course, that the fundamental question of whether the Board did indeed have jurisdiction to examine the merits of the suit goes unanswered. *See also Vendo,* 433 U.S. at 642 (injunction to "preserve" a case or controversy is not "necessary in aid of" a court's jurisdiction).

Finally, in a footnote, the NLRB contends that its order requiring termination of the Restaurant's suit fell within the Section 2283 exception allowing injunctions against state proceedings when "expressly authorized by Act of Congress." [NLRB Brief, p. 46 n.31.] The Board bases its contention upon Section 10(e) of the NLRA, 29 U.S.C. § 160(e), which gives the Board the power to petition the Circuit Courts of Appeals for enforcement of its orders. However, not all federal statutes authorizing injunctive relief are exceptions to Section 2283. In *Mitchum v. Foster,* 407 U.S. 225 (1972), the Court held that the test for whether a federal statute constitutes an "expressly authorized" exception to Section 2283 is "whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Id.* at 238. In *Mitchum,* this Court found that 42 U.S.C. § 1983 (1981) is such an "expressly authorized" exception because "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people" in situations where the state courts could not sufficiently protect federal rights. *Id.* at 242. In the present case, it cannot be said that the NLRA can be given its intended scope "only by the stay of a state court proceeding." If, as the Board claims, the Restaurant's suit is groundless and retaliatory, the state court is the appropriate forum for determining an effective remedy, thereby alleviating any infringement of NLRA rights caused by such a suit. Moreover, in *Linn* and *Farmer,* unlike *Mitchum,* this Court found that Congress intended to reserve to the states substantial control over certain disputes "deeply rooted in local feeling and responsibility." *Farmer,* 430 U.S. at 298, 302-04; *Linn,* 383 U.S. at 62-64. [See also state court cases cited in petitioner's opening brief, p. 10 n.5.] The civil litigation between the Restaurant and the protesters is just such a dispute.

CONCLUSION

For all the foregoing reasons, Petitioner, Bill Johnson's Restaurants, Inc., respectfully requests that the decision of the Ninth Circuit with respect to the issues raised herein be reversed, and that the case be remanded to that court with instructions to deny enforcement of the Board's order insofar as it relates to the civil lawsuit filed by Petitioner in Maricopa County Superior Court (No. C375470).

Respectfully submitted this 15th day of March, 1983.

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